The Online Coalition
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June 2, 2005

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463
Internet@fec.gov

Re: Comments on Notice 2005-10: Internet Communications

Dear Mr. Deutsch,

These comments are submitted in response to the Federal Election Commission's Notice of Proposed Rulemaking 2005-10 published at 70 Fed. Reg. 16,967 (April 4, 2005), seeking comment on how the Commission should amend the rule defining "public communication" in 11 CFR 100.26, as mandated by U.S. District Court Judge Colleen Kollar-Kotelly in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) to include certain public communications taking place on the Internet. The Commission also seeks comment on whether to extend the exception for news stories, commentaries and editorials to media activities that appear on the Internet and whether to extend the protections of certain volunteer activities to individuals.

The electorate is best served when the Commission crafts rules that remove *actual* corruption while encouraging more participation, opinions and choices to permeate the democratic process.

It is in this spirit and for the reasons stated below that the Commission should move forward with its proposal to include the term "paid advertisements on the Internet" under the definition of "public communication," to extend the protections afforded to volunteers to include individuals and groups of individuals, and to treat certain online publications as falling under the "media exemption" rule.

In addition, Michael Bassik, representing the Online Coalition, and Michael Krempasky, representing Redstate.org, request the opportunity to testify at the public hearing on June 28 or 29, 2005.

Thank you for your consideration and for the opportunity to submit these comments.

Respectfully,

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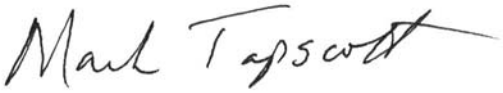

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We are pleased to have the opportunity to comment on the Federal Election Commission's draft rules revising the definition of "public communication" and seeking comment on the scope of "contribution" and "expenditure" as those terms relate to Internet media and journalism.

At the outset, we wish to frame our comments with some general observations. First, it should be manifestly clear that this issue is not a partisan one. We represent groups with very different perspectives on the issues confronting the country and the world. What we share, however, is the belief that open and free-wheeling debate is necessary for democracy to work. We are not interested in seeking short-term advantage by using the government to silence the speech of those who disagree with us. Frankly, we would rather have them speak. Although the issue is nonpartisan, the debate over Internet regulation is a political one that pits elite arbiters of the status quo against individuals and groups who are often new to media. Please remain sensitive to this political dynamic as you consider your choices.

Moreover, you are considering regulating an area where the forms of communication are changing quickly. Much of the public give-and-take on the rulemaking has centered on web logs, or "blogs." While not to minimize the important role blogs play, we urge that you should be careful that the rule you write, and its explanation, is not so constricted that it lacks application to next year's (or next decade's) communication technology. We strongly suggest that you not regulate based on "form" – i.e., blogs, listserves, email, podcasting, text messaging, VoIP – but based on function. In our comments, we hope to clarify this in application.

Finally, your rules should be informed by the regulatory purpose of the Federal Election Campaign Act. Your rule should address corruption, the appearance of corruption, the involvement of foreign nationals, or the use of the corporate or labor forms of organization and their "aggregations of wealth" in ways that drown out the views of others. Your regulatory discretion does not extend to "leveling the playing field," or to improving the "tone" of debate, or to limiting the amount spent on politics or other similarly "salutary" goals.

With those general comments in mind, we turn to the specifics of the Proposed Rule.

I. Revisions Related to *Shays v. FEC*

A. 11 CFR 100.26 – Definition of Public Communication

In this part of the Proposed Rule, the FEC revisits what is "general public political advertising" and thus a "public communication." Strictly speaking, this regulation applies most directly to party committees, but also determines the application of disclaimer rules, coordination rules (which are up in the air as the FEC considers this

rulemaking) and allocation rules. The Notice suggests that this aspect of the rule will have an "extremely limited impact, if any, on the use of the Internet by individuals as a means of communicating their political views, obtaining information regarding candidates and elections, and participating in political campaigns."

We feel far less confident that we can predict how any rule change anywhere in this complex maze of federal campaign finance regulation will play out in the real world. Having said that, we appreciate the effort the Commission has shown to draw within the regulatory ambit of paid advertising, while leaving "communications over the Internet" otherwise excluded from the definition of public communication. However, we believe the explanation provided could be more persuasive. The Commission's explanation for excluding "unpaid" Internet communications is that it seeks to "balance" the Act against policy considerations that make it wise to leave the Internet unmolested. See Proposed Rule, p. 16,969-70. Basically, the FEC finds that the Internet is popular, low cost and useful, and while we agree, this analysis isn't grounded in the Act or the Commission's regulatory mission. We believe the explanation would be stronger if it dealt squarely with what it means for a communication to be "public." Internet communications are self-selected and noninvasive. Consumers seek out what they want, and control what they see. Regardless of how much money is invested in a web site, podcast or Quicktime movie, the communication only occurs because of the private decision of the consumer to make it happen.

The same, however, cannot be said for third-party advertising on a site, or for pop-up-type advertising, especially for those with computers running "adware." These messages are functionally indistinct from conventional advertising, in that the consumer has not sought them out and exercises less control over them, until such time as the consumer employs ad blockers and software that removes them completely, at which point they are never received. They are "public" as they are thrown out into the stream of communication without (much) regard for the recipient's desires. Moreover, we should stress that the site the consumer visits often does not control the content of such third-party advertising, and the site should not be considered the author or owner of that advertisement for *any* regulatory purpose. See p. 16,970 fn. 18. In short, we support the revised definition of "public communication" but hope that the Commission can re-craft its explanation to better demonstrate the rule's congruence with the Act.[1]

The Commission specifically asks whether the rule should specify that "bloggers" are not included in the definition of "public communication." See p. 16,971. As we understand it, that would be the result flowing from the revised rule. But, as we stated above, we think it would be a mistake to craft the rules to fit specific forms of communication that may be transcended by other forms over time. If the Commission believes there is the slightest bit of confusion on the scope of the rule, then it should explain the scope in its

[1] Justified this way, the question posed at p. 16,971 is easily answered – password-protected sites restricted to members of the restricted or solicitable classes of corporations, unions or other groups are not "public" either.

explanation of the final rule. It should, however, avoid crafting a regulation specific to Internet forms like blogging.

B. 11 CFR 110.11 Scope of Disclaimer

The Commission offers a slightly different definition of "public communication" in its revised disclaimer regulations. Here, that standard also includes "unsolicited electronic mail" of over 500 substantially similar communications if they solicit contributions or expressly advocate the election or defeat of a candidate,[2] defining "unsolicited" to mean addresses purchased from a third party.

We appreciate the Commission's attempt to construe the disclaimer requirement to apply only to "spam." However, true "spam" has been notoriously difficult to regulate – witness the volume of spam today that advertises clearly fraudulent and illegal activity – and one must wonder what success the FEC would have applying a disclaimer requirement. More specifically, we find the proposed rule confusing. "Unsolicited" does not mean "purchased." Divorced from the plain meaning of the words, the definition of "unsolicited" offered by the Commission makes the law more difficult for the non-specialist to follow. If the Commission believes it should require disclaimers on mass messages (whatever the medium) of 500 or more sent to recipients who have not opted-in to receive messages, it should write a rule saying that. Such an approach would take away some of the confusion in the proposed rule, and answer the alternative questions about swapping lists found at page 16,972. Even so, we suspect that the rule will be unenforceable against true "spammers" and will merely catch up uninformed senders in low-level enforcement matters.

If the FEC insists on moving forward in this area, it would minimize the regulatory impact on the uninitiated if the threshold were not defined by a predetermined quantity, but instead a significant monetary threshold. We believe that a useful measure in this case was originally proposed by Common Cause and Democracy 21 in January of 2000 when they wrote to the Commission[3],

> *"Common Cause and Democracy 21 suggest that if an individual, in establishing a website (or posting online), spends more than a substantial threshold amount (e.g., more than $25,000) for the purpose of advocating the election or defeat of a particular candidate, then, even if the individual acts independently of any campaign, the individual's site should include a disclaimer and his/her expenditure should be disclosed. But independent*

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[2] The proposed rule applies to political committees slightly differently, but we leave it to other commentators to discuss the strengths or weaknesses of that proposal.

[3] Common Cause & Democracy 21 comment in response to Notice of Inquiry 1999-24, page 7, available at http://www.fec.gov/pdf/nprm/use_of_internet/notice_comments/commoncause.pdf (May 29, 2005)

activities by individuals on the Internet that do not meet this expenditure threshold should not be regulated."

Accordingly, we suggest that disclaimers could be appropriate for unsolicited email expenditures of $25,000 or more.

Regarding whether bloggers paid by candidates should be subjected to a disclaimer requirement, we think that if the Commission follows our general principles the answer must be "no." Nowhere else in the regulations are recipient vendors, consultants or other payees required, as a condition of expressing their point of view, to use a disclaimer. If the campaign provides the content and pays for the web space, that is an advertisement. However, that is not the "controversy" here. Let's be plain – some individual bloggers received financial support from campaigns in 2004. We know this because those expenditures were reported by the campaigns. It is not unusual for individuals, who receive payment from campaigns, to appear and express their views on cable television news shows, or radio, or on the op-ed pages of newspapers and magazines. The FEC has never felt the need to impose a disclaimer requirement there. It should not here.

Furthermore, we cannot understand how a disclaimer would work in practice. Must the site feature a disclaimer on every entry? Only ones related to the campaign that made the payment? Suppose the blogger is paid by the campaign but does not write about the campaign specifically, but instead debates important current events? Is there some kind of "express advocacy" rule? How would disclaimers work with sound or video files? While we strongly oppose a disclaimer requirement, if the Commission insists upon pursuing this idea, it must set forth clearly what is required to comply with the rule.

II. Rules Related to Scope of "Expenditure" and "Contribution"

Strictly speaking, the "public communication" rule is all that is before the Commission in the wake of the *Shays* decision. However, the Commission has gone further to consider what types of Internet communications might be protected from FEC regulation as "expenditures" and "contributions." We support broad protections in this arena, based on the principles we articulated at the outset of these comments. We oppose unnecessarily complicating the regulations. Therefore, we hope that the Commission can clarify these rules in the manner we suggest.

A. 11 CFR 100.73 and 100.132: Definition of News Story, Commentary or Editorial

We believe the proposed revision to the definition of "news story, commentary or editorial" introduces unnecessary ambiguities into the regulations.[4] It repeats the existing

[4] We are assuming that the standard used to evaluate whether spending is an "expenditure" in this context is express advocacy for or against a clearly identified federal candidate, or the presence of a solicitation for or against such candidate.

exclusion for "covering or carrying a news story, commentary or editorial by any broadcasting station...newspaper, magazine or other periodical publication" adding "whether the news story, commentary or editorial appears in print or over the Internet…" The exemption is crafted in such a way as to apply only to communications by any broadcasting station, newspaper, magazine or other periodical publication. This awkward wording suggests that the FEC means to distinguish between newspapers and periodicals, whose Internet media activities are exempt, and some classifications of other persons and organizations, which are not. Yet, the explanation for the proposed rule states "the proposed regulation expressly rejects a policy that only a bona fide press entity with an off-line component is entitled to protection in their online news stories, commentaries and editorials." See p. 16,975. If that is the case, why is the rule written to suggest otherwise?

Apparently, the bona fides of the speaker as "press" or "media" are still the touchstone for regulation, to be determined on a "case by case" basis. See p. 16,975. Why? In the explanation, the Commission noted Congress's initial intent to guarantee "the unfettered right of the newspapers, television networks *and other media* to cover and comment on political campaigns." H.R. Rep. No. 93–1239, 93d Congress, 2d Session at 4 (1974) (emphasis added). To be sure, much Internet-based media activity would easily fit within conventional categories of "press" and "media" and may have no reason to be concerned. Almost every major source for traditional reporting is today publishing online, including newspapers, periodicals and television stations. Today, fully 50 percent of online adults read news on the web every day.[5] Whereas only 18 percent of the U.S. population researched political news online in 2001, fully 29 percent – almost one-third of the electorate – did so in 2004.[6] So, some online media activity is "mainstream" by anyone's definition.

Yet many of the commentators online might not pass a test as traditional "bona fide" "press" entities. The most conspicuous examples are blogs. The term "blog" was first coined in 1997, but didn't gain widespread notoriety until Howard Dean's 2003 presidential campaign in which he managed to cultivate a great deal of support and money from individuals who read blogs supporting his candidacy.[7] While still a nascent medium for information dissemination, blog readership jumped to 32 million – 27

Obviously, if the definition of "expenditure" is not so clear-cut, then the vagaries (and breadth) of the rule pose an even greater problem for Internet journalism.

[5] JupiterResearch, eMarketer: For News, an Online Tilt, April 29, 2005, available at http://www.emarketer.com/Article.aspx?1003376 (April 29, 2005) (password protected, document on file with author)

[6] Pew Internet & American Life Project, The Internet and Campaign 2004, March 6, 2005, available at http://www.pewinternet.org/PPF/r/150/report_display.asp (May 27, 2005).

[7] Wikipedia, Weblog, http://en.wikipedia.org/wiki/Weblog (May 27, 2005)

percent of Internet users – by the end of 2004, representing a 58 percent increase in growth in less than one year.[8]

There are currently more than ten million blogs on the Internet, which can likely be attributed to the fact that they are both easy and cheap to create and maintain.[9] Blogs can be created in minutes and placed on purchased or rented web servers – or at no cost at all using a free service like Blogger.com or LiveJournal.com. More than 15,000 new blogs are created every day, or one new blog every six seconds. Blogs cover literally thousands of different issues and topics, ranging from the obscure[10] to the mundane[11].

Political blogs, which were popularized during the war in Iraq and the subsequent election cycle, tend to adopt a particular ideology or slant. Certain blogs focus on providing well-researched news stories to their loyal audiences while others act more as news aggregators from different sources. Nearly every blog also features opinions and editorials based on issues relevant to their readers. Commentary is first posted by the blogger, but additional commentary may be provided by anyone who wishes to write a "comment" or "reply" to the original posting.

Bloggers from all political persuasions dwarf their professional counterparts in terms of the resources that matter – expertise, creativity, even motivation and energy – and tend to provide deeper analysis and coverage of stories that the mainstream media – referred to online as MSM – tends to ignore. Over time, bloggers have proven their worth as investigative journalists. One thing bloggers do well is fact-checking. It is the rare political television ad that evades critical examination on blogs. Another example of the news and analysis bloggers bring to political debate surrounds this NPRM. Much of the discussion regarding regulation of political speech on the Internet was sparked by FEC Commissioner Bradley Smith's interview with CNET|News.com's Declan McCullagh on March 3, 2005, indicating the potential for a "coming crackdown on blogging."[12] It took only a few days for more than 3,000 Democrat and Republican online activists to sign an open letter to the FEC voicing their concerns regarding potential regulation of the web.[13]

As a measure of how a story moves, one can also see from the Intelliseek's BlogPulse Trend Report below that bloggers mentioning the term "FEC" skyrocketed the day

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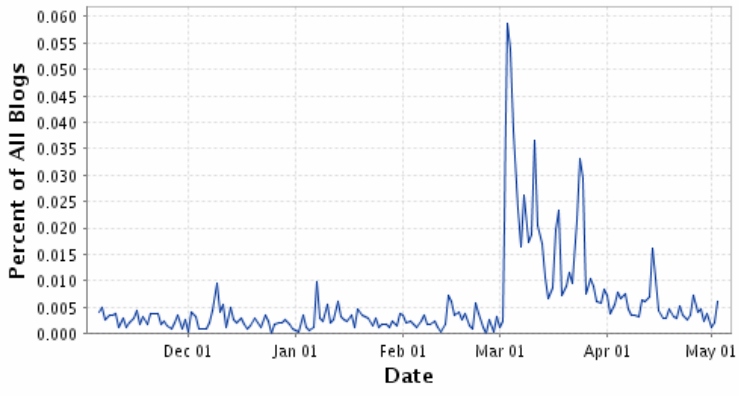
[8] Pew Internet & American Life Project, The Internet and Campaign 2004, March 6, 2005, available at http://www.pewinternet.org/PPF/r/150/report_display.asp (May 27, 2005).
[9] Sifry's Alerts, Ten Million Blogs Tracked, May 16, 2005, available at http://www.sifry.com/alerts/archives/000312.html (May 30, 2005).
[10] Down Home Soul Food Cooking Blog, available at http://www.chitterlings.com/blog (May 30, 2005).
[11] A Pet's Blog, available at http://www.apetsblog.com (May 30, 2005).
[12] Declan McCullagh, Coming crackdown on blogging, C|Net News.com, March 3, 2005, available at http://news.com.com/The+coming+crackdown+on+blogging/2008-1028_3-5597079.html (May 27, 2005).
[13] Online Coalition, www.onlinecoalition.com (May 27, 2005).

Commissioner Smith's interview was published and took more than a month to return to pre-interview levels.

Six-Month Trend Report of Blogs Mentioning "FEC"[14]



Bloggers have been given press passes to the White House Briefing Room, national political conventions of the major parties, and are featured as commentators on conventional news programs. Rick Dunham, President of the National Press Club summed it up best when, in introducing a panelists of bloggers to debate the question "Who is a journalist?" exclaimed, "the days when you could tell who was a reporter by looking for a press card stuck in a fedora are long gone."

Are "blogs" periodicals? Are Internet journalists "press?" "Media?" This rule should be able to answer those questions in the positive, but does not.

To summarize, the proposed rule shows that the Commission is still thinking of "press" as conventional professional media establishments, such as newspapers, magazines and periodicals, and potentially others "like" them. A better approach would be to exempt "news, opinion or commentary" regardless of mode of dissemination or the press or media bona fides of the speaker. Critics of this simpler approach object that the "exception would swallow the rule" and allow for unlimited expenditures on political speech by corporations and other prohibited sources. We are unpersuaded that the proposed rule is preferable from that perspective – after all, it protects media corporations from regulation, while leaving upstart individuals and groups uncertain of their status. The rule has already been "swallowed" as it relates to some of the most powerful and influential corporations in the country.

We also wonder whether allowing corporations and unions to spend funds on Internet commentary is a dangerous thing. If the commentary, reporting or editorializing is useful and interesting, people will read it. If it is boring, hackneyed or wrong, people will read something else. As we have stated before, on the Internet the amount of the expenditure

[14] Intelliseek BlogPulse report for term "FEC," available at www.blogpulse.com (May 5, 2005).

may bear little relation to the message's influence, and the traditional rationale for the prohibition on corporate or labor funding seems unavailing.

As an aside, the scope of the press exemption is of special concern to incorporated blogs and group blogs, who might not benefit from the exemption for individual or volunteer activity, as discussed in detail below.

We understand that in some situations a person or group engaged in Internet communications could be so entwined with a candidate or political party as to become an extension of that regulated entity under the Act. The existing law modifies the press exemption for entities owned or controlled by candidates or parties, and we would agree that this should also apply to online journalism. Simply put, we do not think that a government commission should be deciding "case by case" whether an individual or group's online journalism is "conventional" enough to deserve protection. That power invites abuse and censorship – if not now with the well-meaning membership of this particular Commission, then perhaps later.

B. 11 CFR 100.94 and 100.155 – Individual or Volunteer Activity

The Proposed Rule also considers whether Internet activity could be protected from treatment as a "contribution" by being classified as individual volunteer activity exempt in the Act under Section 431(8)(B)(i). The Proposed Rule contains two new exceptions, to be promulgated at 11 CFR 100.94 and 100.155 so that uncompensated individuals, acting as volunteers or independently, will not be making a contribution or expenditure of their time or of the value of the use of computers when performing Internet activities. The exemption extends to the use of personal computer equipment, equipment at the individual's residence or equipment at a "public facility."

As an initial matter, we support rules that exempt both "volunteers" for a campaign and "independents" acting on their own. It would be an odd result if a campaign volunteer was exempt but someone acting independently was not. However, we do not understand the Commission's attempt to define and restrict the source of the individual's computer equipment and services. The new definitions are overly lengthy and complicated in part because the proposed rule tries to predict how and where individuals will be using computers. The explanation states that the rule would prevent individuals from using equipment or services provided by someone else "solely for the purposes of allowing another individual to participate in Internet activity." See p. 16,975. If that is the intended goal, then the exemption as it stands is underinclusive. One example: many of the most prominent Internet journalists are faculty members at private universities, who use their faculty computers to post. It is not at all clear that they would be protected under this exception, leaving them to rely on the media exemption, which, as we have discussed, may not apply.[15]

[15] In the explanation, the Commission states that an individual could use computers or services provided "by a friend" under the exemption. See p. 16,976. As we read the

More generally, if the "Internet activity" is uncompensated volunteer or independent activity, why does it matter? Is the Commission worried that prohibited sources will donate computers to campaigns through this exemption? If that is the problem, the rule should be crafted more clearly to address that concern, without creating a situation where individuals have to pause and ask themselves if the domain, software or ISP they are using is proper.

This issue becomes more perplexing when one considers the status of group sites or incorporated sites. The proposed exceptions by their terms apply to individuals only. While it is true that any "group" comprises individuals, the plain reading of the rule suggests that only individuals acting "individually" are protected from regulation of "contributions" or "expenditures." Under the Proposed Rule, would a member of a group blog be protected if he posted to the site from his computer in his faculty office at a private law school? Can a student post from a library computer at the same school? Does their use of an impermissible computer implicate the entire group? Can the blogger post to the site at all, if it was set up by another individual in the group? Does it matter who registered the domain? These questions may seem picayune but they are important. If the exemptions do not apply, and the enterprise is not otherwise exempt under the "press exemption," then the group would become a political committee once it received contributions or made expenditures of $1,000.

Some of the most widely read sites are operated by groups.[16] In the increasingly crowded medium, collaboration between and among bloggers is often an attractive method of increasing content as well as traffic. In addition, even those websites not operated by groups often invite "guest posters" to contribute on a short-term basis.[17]

Moreover, some sites have chosen to incorporate for liability-limiting purposes.[18] Indeed, with the increasing attention paid to blogs and bloggers, we have also seen more occurrences of bloggers being sued for content posted to their website.[19] The practice has become so widespread that the Electronic Frontier Foundation has launched a worldwide database of "cease and desist" letters received by bloggers.[20]

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draft rule, that would not be the case, unless the computer was also in a public place or the individual's residence.

[16] Examples: http://www.powerlineblog.com, http://www.wizbangblog.com, http://www.redstate.org, http://www.dailykos.com, http://www.bopnews.com, http://www.polipundit.com

[17] http://instapundit.com/archives/018770.php

[18] Examples: http://www.andrewsullivan.com, http://www.mydd.com, http://www.dailykos.com, http://www.talkingpointsmemo.com

[19] Jonathan Finer, Teen Web Editor Drives Apple to Court Action, The Washington Post, Jan. 14, 2005, available at http://www.washingtonpost.com/wp-dyn/articles/A7937-2005Jan13.html (May 27, 2005).

[20] Chilling Effects Clearinghouse, available at http://www.chillingeffects.org (May 27, 2005)

These entities are fictitious persons, not "individuals," and facially do not fall within the "individual" or "volunteer" exemptions. For them, the first dollar spent on express advocacy or a solicitation is a prohibited corporate expenditure in a federal election, unless some other exemption applies. Coordination with a campaign would result in an illegal corporate contribution. Yet incorporation for liability purposes is allowed under FEC regulations – for *political committees only*. See 11 CFR 114.12. A site wishing to incorporate for liability-limiting purposes and solicit funds for candidates, as Daily Kos did in the 2004 election, could do so – only if it were willing to register and report as a committee, and observe federal campaign finance restrictions. We see no regulatory purpose served here. The upshot of the cramped scope of the exclusion is to deny Markos Moulitsas (the *individual* behind Daily Kos) and anyone else in his position the ability to organize his affairs in a way that suits him. If the Commission crafts an appropriately protecting media exemption, then many of these concerns may fall away, since that exemption does not apply only to "individuals." If not, then we strongly urge the Commission to extend the "independent or volunteer" exemption to uncompensated groups and to entities incorporated for liability-limiting purposes.

Similarly, the Commission's approach to the use of corporate facilities poses difficulties for incorporated blogs that do not otherwise qualify for the press exemption. See revised 11 CFR 114.9 at p. 16,978, explanation at p. 16,976. Assuming that a blog incorporated for liability-limiting purposes has acquired equipment and services through its corporate form, how can Daily Kos, for example, operate if its use of its equipment is limited to "occasional, isolated or incidental" limitations, and subject to reimbursement? The implications are especially troublesome given the Commission's statement that individuals who may use corporate laptops and other equipment at home for non-work purposes remain chained to the "occasional, isolated or incidental" use restriction. See p. 16,977. The Commission explained in the independent or volunteer context that it sought to prevent one person from providing another computer services solely for political use. If that, indeed, is the Commission's understanding, why in this context is it pursuing the use of computers, available to an individual for non-work purposes, as illegal corporate facilitation?

In closing, we appreciate the effort the Commission is making to address comprehensively the issues raised by political speech on the Internet. However, the proposed rules are in many places overly complex, in some areas contradictory, and generally presume a static situation that will not persist. As explained above, we believe some provisions are overly broad, and the exemptions are underinclusive. We are grateful for your time and attention, and look forward to testifying publicly on our views.